Woods

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Phillips Cartner & Co., Inc.

File: B-224370.2

Date: October 2, 1986

DIGEST

An agency's specification of particular brand name engines in a procurement of a tugboat for service in the Panama Canal is not unduly restrictive of competition where (1) the agency shows that standardization of the engines in its tugboat fleet will enable it to achieve a needed in-house maintenance and repair capability, (2) the alternatives suggested by the protester would not adequately address the needs of the agency, and (3) the agency receives seven offers in response to the solicitation.

DECISION

Phillips Cartner & Company, Inc., protests requirements contained in request for proposals (RFP) No. P-86-23 issued by the Panama Canal Commission. We deny the protest.

The solicitation is for a tractor tugboat, with an option for one additional tugboat, for use in the Panama Canal. The specifications generally are a mix of design and performance requirements, the major exceptions being the specifications for the main engines and the generator engines. The solicitation requires two General Motors EMD 645-E6 main engines and specifies Detroit Diesel Series 71 generator engines. There is no provision permitting an offeror to propose a tugboat with functionally equivalent engines. The protester, who did not submit a proposal, contends that these requirements are unduly restrictive of competition since the engines it would use in its tugboat can perform, its says, as well or better than those required. The agency received offers from seven firms prior to the closing date.

As a preliminary matter, the agency argues that we should dismiss this protest because it does not appear that the protester is a potential prime contractor. The agency contends that the protester therefore is not an interested party under our Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1986). The agency also argues that the protester may not be eligible for award because it is not a manufacturer or a regular dealer under the Walsh-Healey Public Contracts Act, 41 U.S.C. §§ 35-45 (1982). In support of these contentions, the agency has provided us with excerpts from a Dun & Bradstreet report which indicate that the protester is a management, consulting, and public relations firm. In response to the agency's contention, the protester argues that the information in the Dun & Bradstreet report is outdated and asserts that it will submit an offer as a prime contractor if it is successful through this protest in forcing the agency to relax its engine requirements. The protester provided us with a synopsis of the backgrounds of its key personnel which indicates they have extensive relevant experience. Based on these representations by the protester, which we have no reason to believe were made other than in good faith, it appears to us that the protester has the requisite interest in this procurement to maintain a protest of the specifications. The issue of Walsh-Healey eligibility is to be determined by the agency prior to award, subject to review by the Small Business Administration, if the protester is a small business, and the Department of Labor. Shelf Stable Foods, Inc., B-222919, June 24, 1986, 86-1 CPD ¶ 586.

When a protester challenges solicitation requirements as being unduly restrictive of competition, and submits some support for that proposition, the procuring agency must establish prima facie support for its position that the restrictions it imposes are reasonably related to its needs. Deere & Co., B-212203, Oct. 12, 1983, 83-2 CPD ¶ 456. This requirement reflects the ageny's obligation to use specifications that permit full and open competition and that contain restrictive provisions only to the extent necessary to satisfy the agency's legitimate needs. 41 U.S.C. § 253a(a)(2) (Supp. III 1985). If the agency provides the necessary support for the specifications, the burden shifts back to the protester to show that the specifications are clearly unreasonable. Ralph Construction, Inc., B-222162, June 25, 1986, 86-1 CPD ¶ 592.

Contracting officials are in the best position to know the government's actual needs because they are familiar with the conditions under which the goods or services will be used. See Libby Corp., et al., B-220392, et al., Mar. 7, 1986, 86-1 CPD ¶ 227. Therefore, the determination of the government's

needs and the best method of accommodating those needs are primarily matters within the contracting agency's discretion. Bataco Industries, Inc., B-212847, Feb. 13, 1984, 84-1 CPD ¶ 179. We will not substitute our judgment for that of the contracting agency absent clear and convincing evidence that the agency's judgment is unreasonable and that the specifications unduly restrict competition. Ameriko Maintenance Co., B-221728, Apr. 1, 1986, 86-1 CPD ¶ 309.

In this case, the agency's justification for the brand name engine requirements is the need to standardize the engines used in its fleet.[1/] The agency currently has 18 tugs, 10 of which are equipped with EMD 645 engines. In addition, the agency has five additional EMD 645 engines in service in its dredging division. The agency reports that it has 190 Detroit Diesel Series 71 engines in use both as primary and as anxiliary power sources in various vessels and other equipment. It has only seven engines of other types in this class.

The agency reports that its operations are conducted exclusively in Panama, thousands of miles from normal supply lines, and therefore it has attempted to become self-sufficient with respect to its maintenance requirements. Engine service and spare parts are not readily available in Panama, the agency reports. It says that many of its service personnel have been trained on the two brand name engines and that it maintains a parts inventory for these engines valued at over $500,000 for the EMD 645 and $300,000 for the Detroit Diesel Series 71 as well as special tools and testing equipment for these engines. Attempting to limit the variety of engines in its fleet is also desirable, reports the agency, because of the high turnover rate among service personnel, the need to shift personnel between Atlantic and Pacific areas, and the mix of Spanish- and English-speaking workers. By achieving a high degree of uniformity in maintenance procedures, the agency hopes to minimize the impact of these variables.

[1/] The agency's report on this protest references a letter of June 9, 1986, in which it denied a protest filed with it by Caterpillar Tractor Company concerning the same brand name engine requirements. Our understanding of the agency's justification for the requirements is based on that letter, as well as on the report submitted in response to Phillips Cartner's protest. Phillips Cartner included as exhibits with its protest to this Office copies of both Caterpillar's protest to the agency and the agency's June 9 response. The protester has addressed the points covered in both of those documents.

The protester argues that the engine restrictions contained in the solicitation are not necessary to meet the agency's needs. The protester asserts that there are a number of other engines available on the market that would perform the required functions and that allowing offerors to propose use of these alternative engines would result in significant cost savings. In addition to a lower acquisition cost, the agency also might benefit from lower operating costs since some of the alternative engines are more fuel-efficient than the EMD 645. (The agency says that whatever savings in fuel costs might be achieved would be minimal.) The protester acknowledges the concerns of the agency regarding spare parts availability, inventory maintenance, and service reliability, but argues that the agency could resolve these concerns by including specific provisions in the contract requiring the contractor to deliver needed spares within a stated time, maintain an adequate parts inventory, and provide maintenance training for agency personnel. Finally, the protester argues that the 4-stroke engine that it would offer is superior to the 2-stroke EMD 645.

Although the parties have debated at some length in this protest the merits of the 4-stroke versus the 2-stroke main engine, we regard this argument as academic in the context of this protest. Although the EMD 645 is of the 2-stroke variety, the solicitation specifies only the EMD 645 and does not provide for offers based on other 2-stroke main engines. The issue in this case, therefore, is solely whether the agency's make and model restrictions are justified. The agency's justification is based not on engine performance, but on maintenance requirements.

We have recognized that although there may be some restriction on competition, an agency may specify brand name components to be delivered as part of a system when the agency has a legitimate need to standardize the equipment it uses.[2/] Julie Research Laboratories, Inc., B-199416, June 16, 1981, 81-1 CPD ¶ 493; JAZCO Corp., B-193993, June 12, 1979, 79-1 CPD ¶ 411. In this case, we conclude

2/ However, most of our prior cases that have considered whether an agency's asserted need for equipment standardization justified the specification of a brand name product involved the pre-CICA exception to the formal advertising requirement that permitted agencies to negotiate contracts where necessary to insure standardization and interchangeability of parts. 10 U.S.C. § 2304(a)(13) (1982); 41 U.S.C. § 252(c)(13) (1982). Usually, these cases involved contracts negotiated on a sole-source basis. See, e.g., Dresser Industries, Inc.--Reconsideration, B-212937.2, June 18, 1984, 84-1 CPD ¶ 633. This case does not involve these statutory provisions, nor does it involve a sole source procurement. In fact, seven proposals were submitted in response to the RFP.

that the agency has demonstrated a legitimate need to standardize its fleet engines and that the protester has not shown the agency's judgment in this regard to be unreasonable.

The agency states that it has experienced considerable difficulty in the past in obtaining timely delivery of spare parts for the engines it currently uses. It says that local parts dealers are unwilling to carry a sufficient stock of the parts it uses, but prefer to order parts from sources in the United States as needed. The agency says this system has resulted in many instances in which parts shipped from the United States are either delivered late or lost. The agency determined that only by relying on its own stock of parts will this problem be adequately addressed. Although the protester suggests that the solicitation could include a specific spare parts response time, this approach would provide only a contractual remedy for late deliveries, but would not necessarily ensure that delivery problems would not actually occur, or would occur less frequently than in the past.

The protester's suggestion that the tugboat contractor be required to maintain a minimum parts inventory (presumably in Panama) might resolve the agency's concern over delivery of parts, but it would not address the agency's other major concern. The agency reports that it is seeking to establish an in-house maintenance and repair capability, but that its location in a foreign country and the nature of its operations make this difficult. These problems are exacerbated, says the agency, when its personnel are required to become familiar with many different engines. By achieving some degree of standardization in its fleet engines, the agency hopes to simplfiy its training procedures and reduce equipment downtime. Although the protester argues that the agency could require the successful offeror to maintain a local inventory and to provide maintenance training on its engines, these suggestions obviously do not address the agency's point that a fleet with various different engines impedes the development of an effective, in-house maintenance and repair capability.

The unique circumstances of this case cause us to conclude that the agency's justification for specifying particular engine to help maintain standardization for maintenance purposes is reasonable. Here, the procurement for the end-item tug was clearly competitive (seven offers were received) and the subject engines constitute only 18 percent of the

value of the tug. Further, and most important, the tug is to be used in a small foreign nation for a function that will tolerate little downtime, making all aspects of maintenance difficult and critical. For these reasons, we cannot conclude that the brand name engine restrictions were unduly restrictive of competition.

The protest is denied.

for Seymour Efros
Harry R. Van Cleve
General Counsel